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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ELAINE CHRISTIAN, Plaintiff and Respondent, v. COUNTY OF ORANGE et al., Defendants and Appellants.	G051720 (Super. Ct. No. 30-2009-00297758) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Reversed.

Lynberg & Watkins, Norman J. Watkins, S. Frank Harrell; Brobeck, West, Borges, Rosa & Douville, David J. Brobeck, Jr., Louise M. Douville and Stephen J. Martino for Defendants and Appellants.

Shernoff Bidart Echeverria Bentley, Gregory L. Bentley, Steven Schuetze; Bentley & More and Matthew W. Clark for Plaintiff and Respondent.

* * *

INTRODUCTION

Elaine Christian was attacked by three large dogs and suffered serious injuries. Christian sued the County of Orange (the County), claiming that it had been negligent in failing to declare the dogs to be vicious and/or dangerous before they attacked her. The County asserted discretionary immunity as a defense to Christian's claims.

The trial court granted a motion to dismiss filed immediately before trial, on the ground that discretionary immunity barred Christian's claims against the County as a matter of law. We reversed the judgment in the County's favor, concluding that the issue of discretionary immunity could not be determined as a matter of law. (*Christian v. County of Orange* (June 19, 2012, G045514) [nonpub. opn.].)

On remand, Christian filed a motion in limine arguing that the issue of discretionary immunity had been resolved in her favor, and the law of the case doctrine prevented any evidence on the issue to be offered at trial. The trial court granted the motion, and a jury returned a verdict in Christian's favor.

In this second appeal, we reverse, and must remand the case yet again. The trial court simply misread the holding of our prior opinion, and erred by concluding the issue of discretionary immunity had to be resolved as a matter of law in Christian's favor. The law of the case doctrine did not bar evidence regarding the issue of discretionary immunity, and Christian has failed to show the error was not prejudicial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In our prior, unpublished opinion (*Christian v. County of Orange*, *supra*, G045514), we set forth the facts and procedural history of the case as follows:

"On December 18, 2008, Christian was attacked by three mastiffs that had escaped from the yard of their owners, Leslie Rodriguez and Tyler Paulson (the Rodriguez/Paulson dogs). A neighbor of Rodriguez and Paulson's was bitten by one of

the Rodriguez/Paulson dogs just before they attacked Christian. Christian was treated over a lengthy period of time due to her extensive injuries. The Rodriguez/Paulson dogs were euthanized.

"During an investigation after the attack on Christian, the County learned of another incident involving two of the Rodriguez/Paulson dogs, which occurred in March 2008 (the Horton incident). In the Horton incident, the victim was Guy Horton, who suffered two puncture wounds to his right ring finger when he tried to break up a fight between his dog and one of the Rodriguez/Paulson dogs. Horton's dog was not on a leash at the time. Horton claimed two of the Rodriguez/Paulson dogs ran up and attacked his dog, unprovoked. Paulson claimed Horton's dog ran at the Rodriguez/Paulson dogs, and one of the Rodriguez/Paulson dogs broke its leash and began fighting with Horton's dog. Horton hit both dogs to break up the fight; it was not clear which dog actually bit Horton. The animal control officer who interviewed Rodriguez and Paulson regarding the Horton incident decided the Rodriguez/Paulson dogs were not vicious or potentially dangerous, and did not provide his findings to the administrative lieutenant of the Orange County Animal Care Services unit.

"The County also learned, during its investigation after the attack on Christian, that the Rodriguez/Paulson dogs had escaped their yard on several occasions during the previous months. A neighbor reported one of the Rodriguez/Paulson dogs had entered her garage, and she had climbed on the hood of her car because she was scared. On another occasion, one of the Rodriguez/Paulson dogs jumped over the fence of a neighbor's yard, frightening the neighbor's children.

"Christian sued the City of Laguna Hills and the County for negligence and negligence per se. A demurrer to the negligence per se cause of action was sustained. The County's motion for summary judgment, which was based, in part, on the defense of discretionary immunity under Government Code section 820.2, was denied because triable issues of material fact were found to exist.

"Immediately before trial, the parties filed briefs on the issue of discretionary immunity. After argument, the trial court treated the County's brief as a motion to dismiss, and granted it as a matter of law: '[L]ooking at all of this as a matter of law, the court finds the discretionary immunity does apply here and the public entity cannot be held vicariously liable because that public employee had discretionary immunity. The court is going to grant the motion to dismiss.' Judgment was entered in favor of the County, and Christian timely appealed." (Fns. omitted.)

We reversed the judgment because the procedure the trial court used to determine the issue of discretionary immunity was improper, and the court could not have determined, as a matter of law, that discretionary immunity barred Christian's negligence claim against the County. (*Christian v. County of Orange*, *supra*, G045514.)

On remand, Christian filed a motion in limine arguing that this court's opinion precluded further discussion of the issue of discretionary immunity, and that all evidence regarding that issue should be barred at trial. Following a hearing, the trial court took the motion under submission. Before the start of the trial, the trial court granted the motion in limine.

The jury returned a special verdict against the County, and judgment was entered. The County timely filed a notice of appeal.

DISCUSSION

I.

STANDARD OF REVIEW

The trial court's orders on motions in limine are reviewed for abuse of discretion (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493), except where the grant of a motion in limine excludes all the evidence relevant to a particular claim and thereby disposes of an entire cause of action. In that situation, the appellate court should apply the standard applicable to a motion for nonsuit—whether the evidence presented by the

plaintiff was insufficient to permit a jury to find in the plaintiff's favor. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 28.)

II.

DISCRETIONARY IMMUNITY

As explained in greater detail in our prior opinion, the Orange County Animal Care Services' policy on vicious dog investigations gives the administrative lieutenant the discretion to determine whether further investigation is warranted after a report is received that a dog is suspected of being vicious or potentially dangerous.

Christian's lawsuit claimed the County's failure to properly conduct an investigation of the Horton incident, in violation of its duties to protect the public from the Rodriguez/Paulson dogs, caused her injuries. The County argued it was not liable to Christian because the animal control officer involved in investigating the Horton incident—Joseph Maurin—was protected from liability by discretionary immunity: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.)

As discussed more fully in the prior opinion, Government Code section 820.2 immunizes planning and policy decisions, but not operational functions performed by government employees, even when the performance of the operational functions involves an exercise of discretion. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981-982.) In the prior opinion, we concluded that the acts of the animal control officer who investigated the Horton incident were more like operational acts than planning or policy decisions. (See *Barner v. Leeds* (2000) 24 Cal.4th 676, 679-680 [deputy public defender's acts were made in her professional judgment, but were not immunized because they did not implicate fundamental policy concerns]; *Sanborn v.*

Chronicle Pub. Co. (1976) 18 Cal.3d 406, 415 [city clerk's decision to discuss matter with the press was within the clerk's discretion, but was not immune because it was incidental to normal office operations, not a policy decision].)

However, we also held that whether the administrative lieutenant's discretionary authority to determine that further investigation of a potentially dangerous dog was necessary had been delegated to the animal control officers, formally or by practice, could not be determined as a matter of law. Therefore, we remanded the matter to the trial court.

III.

THE TRIAL COURT ERRED IN GRANTING THE MOTION IN LIMINE.

Our Supreme Court has explained: "Under the law of the case doctrine, when an appellate court '"states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal . . . ."' [Citation.] Absent an applicable exception, the doctrine 'requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.' [Citation.] . . . [¶] As here relevant, the law of the case doctrine is subject to an important limitation: it 'applie[s] only to *the principles of law* laid down by the court as applicable to a retrial of fact,' and 'does not embrace the facts themselves . . . .' [Citation.] In other words, although an appellate court's legal determination constitutes the law of the case, 'upon a retrial . . . that law must be applied by the trial court to the evidence presented upon the second trial.' [Citation.] Thus, during subsequent proceedings in the same case, an appellate court's binding legal determination 'controls the outcome only if the evidence on retrial or rehearing of an issue is substantially the same as that upon which the appellate ruling was based. [Citations.]' [Citation.] Where, on remand, 'there is a substantial difference in the evidence to which

the [announced] principle of law is applied, . . . the [doctrine] may not be invoked.' [Citation.] Even where the appellate court reverses based on 'the "sufficiency of the evidence[,"] the rule of the law of the case may not be extended to be an estoppel when new material facts, or evidence, or explanation of previous evidence appears in the subsequent trial. [Citations.]' [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 246-247.)

In this case, the trial court concluded the law of the case was that the animal control officer "has no 'judgment' or 'discretion' to decide the issue of whether a dog is vicious or potentially dangerous." The trial court's order granting the motion in limine does not correctly state this court's prior holding. We held, "[w]hether the administrative lieutenant delegated his discretionary authority to the animal control officer, either generally or in this specific case, cannot be determined as a matter of law." (*Christian v. County of Orange*, *supra*, G045514.) We further held, "the evidence before the trial court could not have permitted a determination, *as a matter of law*, that the animal control officer's investigation of the Horton incident was discretionary, rather than ministerial." (*Ibid.*) The law of the case is that the issue of discretionary immunity could not be determined as a matter of law. Yet the trial court's ruling on the motion in limine did just that. That ruling was in error.

IV.

WAS THE TRIAL COURT'S ERROR PREJUDICIAL?

Christian argues that the trial court's error was not prejudicial. More than two weeks after the trial court granted Christian's motion in limine, Lieutenant Robert Evans, who was the field lieutenant for the County's animal care department at the time of the Horton incident, testified at a hearing pursuant to Evidence Code section 402, outside the presence of the jury. Christian cites to at least two places in the record where the County's counsel indicated one of the purposes of that hearing would be to prepare a

record for appeal on the issues of delegated discretion that had been barred by the order granting the motion in limine.[1]

When the Evidence Code section 402 hearing happened, Evans's testimony was much narrower.

"[The County's counsel]: Your Honor[,] Lieutenant Evans is not a layperson; he's here to talk as a fact witness about his job and how this policy is implemented through the County of Orange based on his direct experience in working with that policy.

"The issues with respect to criteria and the appellate court opinion relates to discretion on the part of the Animal Control officer and whether or not he has any discretion or judgment concerning initiating the dangerous dog investigation.

"Lieutenant Evans has that discretion. Lieutenant Evans makes that decision. Lieutenant Evans evaluates and balances criteria. And we believe it's proper testimony. We believe it's relevant. We believe plaintiff directly placed this at issue.

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[1] At one point, the County's counsel stated: "There will be no testimony from . . . Sergeant Oliver regarding Officer Maurin's discretion or ability to make a decision about whether this should be passed up to operations or to the lieutenant, even though it is the policy. [¶] We hope with the [Evidence Code section] 402 with Officer Evans—Lieutenant Evans next week during our case to clarify that for the court and at least make a record of it, if it's out of the presence of the jury, either way, so the court and the evidence reflects that for, perhaps, another appeal down the road, if we have to go that route."

At another point, the County's counsel stated, less definitively: "After Lieutenant Evans comes in for his [Evidence Code section] 402 next week, we may need to revisit this to make a record—perhaps for the Court of Appeal—on this issue. Because the policy that the Animal Control has is not the policy that the court believes, based upon the Court of Appeal ruling. [¶] And of course, they use their—they're the ones that look at this in the field and decide whether it goes up or doesn't go up. That's—that decision—not making the decision of who does the—makes the decision from the dangerous dog investigation, but simply passing it along. [¶] I'm not going to go into it at this point; that's something for the 402 with Lieutenant Evans next week."

"And to have plaintiff be able to talk about the policy, with all kinds of officers of the county who aren't involved in performing those investigations in declaring those dogs, and then slamming the door in our face when we try to come in and explain exactly how the process works, is not fair, highly prejudicial to the county, and I think it's information that the jury needs to come with a true verdict in this case.

"The Court: *All right. I thought we were going to come in here today and just talk about how Lieutenant Evans would make this decision, whether he has training or experience to make these kinds of decisions, how he does it, what that foundation was.*

"[The County's counsel]: *That's our understanding, your Honor, and that's the testimony we intend to elicit.*

"The Court: All right. Let me hear it, and then I'll make a decision." (Italics added.)

During the hearing, Evans testified extensively that he was the person who had the authority to determine whether a dog bite should be further investigated. Therefore, Christian argues, the trial court's erroneous ruling on the motion in limine was not prejudicial because Evans in effect testified that the authority had not been given to the field sergeants. Given the limited scope of the Evidence Code section 402 hearing, the lack of testimony by Evans regarding the delegation of discretion to the animal control officers is not a concession by the County that such evidence does not exist. To the contrary, in a declaration filed earlier in this litigation, Maurin declared he had been trained to use judgment and discretion when investigating dog bite incidents, and he had used his judgment and discretion on numerous occasions before the Horton incident to recommend an investigation not be undertaken. (*Christian v. County of Orange*, *supra*, G045514.)

On appeal, Christian also cites Evans's trial testimony that he was not only the person who "make[s] that call at the end, whether they're a declared or not declared dog, [he's] the guy that makes a decision to launch an investigation or not in a given

situation." Like the testimony in the Evidence Code section 402 hearing, this trial testimony was given *after* the trial court entered its order determining the issue of discretionary immunity. Significantly, even this trial testimony does not establish whether Evans delegated his authority to the animal control officer who investigated the Horton incident.

Further, in opposition to the motion in limine that is the subject of this appeal, the County offered evidence that hundreds of reports of dog bites each year are resolved without the intervention of the administrative lieutenant, which evidences the policy that animal control officers have the delegated discretion to evaluate and screen out complaints, which are not worth further investigation by an administrative lieutenant.

For the benefit of the parties and the trial court, we hasten to add that this opinion does *not* establish that Maurin's actions were or were not covered by the discretionary immunity doctrine. Nor are we expressing an opinion as to how the issue may finally be resolved. All we are saying with certainty is that the trial court may not resolve the discretionary immunity issue as a matter of law.

DISPOSITION

The judgment is reversed. Appellants to recover costs on appeal.

FYBEL, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.